Testimony of Sherrilyn A. Ifill Before ABA Joint Commission to Evaluate the Model Code of Judicial Conduct

August 6, 2004

Chairman Harrison and members of the Commission:

Thank you for this opportunity to contribute to the important discussion you've generated in your review of the Model Code of the Judicial Conduct. As you can see from my bio [attached], I have devoted the considerable bulk of my career as a litigator and scholar to exploring and promoting the role of judges in our democracy. I continue to believe that judges have the best, the hardest, and the most important job among the three branches of government. It is for this reason, perhaps, that I am so keenly and passionately committed to ensuring that judges and judiciary reflect the very highest ideals of leadership in our democracy.

I have read the draft revisions to Canons 1,2,3 and 4 of the Model Code. While the draft Canons and Commentary provide a rich basis for discussion and debate I will limit my comments today to one aspect of the draft that I find especially troubling and which as yet remains unaddressed by other commentators.

The Supreme Court's decision in *Republican Party of Minnesota v. White*, 536 U.S. 765 (2002), despite its many flaws, has provoked a much-needed and long-neglected focus on the meaning of impartiality in judicial decision-making. It is an examination I have been calling for in my scholarship for a number of years. *See e.g.*, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 Washington & Lee L.Rev. 405 (2000); *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 30 Boston College L.Rev. 95 (1997). My interest in this issue has been driven largely by what I see as the critically important task of moving the conversation about racial and gender diversity away from what I

regard as a deeply unsatisfying and limited conversation about "appearances" and "public confidence" and towards a more rigorous and thick conversation about the relationship between diversity and impartiality, and the potential for diversity to improve judicial decision-making. *Republican Party of Minnesota v. White* has provided an excellent opportunity to examine these questions. Indeed, the license taken by Justice Scalia in *White* to define the concept of judicial impartiality highlights the failure of the Bar to come to terms with perceived contradictions between and among core elements of the judicial function – principally impartiality and independence-- and methods of selecting judges that suggest that there is a representative characteristic to the judicial function.

I confess that I would not have selected Justice Scalia as the principal facilitator of this conversation. Nor would I have preferred that these questions be given such a heavy-handed framing by the Supreme Court. In my view the Court in *White* attempts to impose on the Bar and on states a cramped and uninformed analysis of the role of state court judges and the conduct of judicial elections. Moreover, I read into both the majority opinion and perhaps especially into Justice O'Connor's concurrence, the Court's own deeply self-conscious articulation of what judicial impartiality means. Nevertheless I do read *White* as an invitation to the Bar to rigorously explore these issues. I do not regard *White* as some do -- as the end of a conversation. Rather I view it as a beginning.

Given the Supreme Court's decision in *White*, the Bar – especially the American Bar Association – must to my mind become more aggressive in defining the nature of the judicial function. I believe that this Committee in reviewing and revising the Model Code must take its rightful place as a leader in this regard. I find this to be most urgent as it relates to the concept of judicial impartiality and the relevance of diversity to impartiality. The importance of judicial

impartiality cannot be gainsaid. It appears throughout Canons 1-4 and the accompanying Commentary. It is deemed in this country and in every other democracy to be essential to the legitimate function of the rule of law. Yet in my view the draft of the Code fails to take the opportunity to meaningfully and substantively articulate the meaning of impartiality in both its individual and structural dimensions.

In *White* Justice Scalia identifies three possible definitions of impartiality, using as his sources Webster's New International Dictionary and his own sense of how this term could defined in the context of judges. 536 U.S. 775-776. He first notes that despite the use of the term "impartiality" throughout the Eight Circuit's *White* opinion, the Minnesota Code of Judicial Conduct, and the American Bar Association's Code of Judicial Conduct, "none of these sources bothers to define it." *Id*. at 775. Thus Justice Scalia begins his attempt to define impartiality with a more or less blank slate. He first defines impartiality as "lack of bias for or against either party to the proceeding." *Id*. at 775. The second possible definition of judicial impartiality recognized by Justice Scalia is "lack of preconception in favor of or against a particular *legal* view." *Id.* at 777 (emphasis in original). Justice Scalia finds that the Minnesota Announce clause is not narrowly tailored to serve the first definition of impartiality. As to the second, Justice Scalia finds that this is not a compelling state interest. The final possible definition of impartiality identified by Justice Scalia is "open-mindedness." Justice Scalia does not expound on the merits of this form of impartiality for the simple reason that he finds that the Minnesota Supreme Court did not adopt the announce clause to further this form of impartiality. *Id*. at 778. It is interesting that "open-mindedness"-- the definition of impartiality that I regard as embodying the highest aspirational role for judges – is given the least treatment by Justice Scalia. I regard this as a blessing in disguise, in that it leaves the Bar open to embrace "open-

mindedness" as a key component of impartiality without the taint of what would likely have been Justice Scalia's cynical and cramped conception of this ideal.

As many scholars and commentators have noted, Justice Scalia's analysis of judicial impartiality is deficient in any number of ways. It fails to account for ways in which judges can be biased against classes of parties rather than just individual litigants. It essentially reads the importance of the "appearance of impartiality" out of the due process impartial judge mandate. Although he does not expressly attempt to reverse the Supreme Court's 1954 admonition that "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14 (1954), his failure to recognize appearances as a critical part of impartiality suggests that Justice Scalia gives it little weight. His remarkable recusal opinion in *Cheney v. District Court of the District of Columbia*, 541 U.S. ___ (2004) this past May bears this out.[1]

I believe that it is not too late – in fact the time is just right -- for the ABA to define judicial impartiality, and to define it in such a way that fleshes out the bare, stark definitions offered by Justice Scalia in *White*. In particular, I encourage this Committee to think about revising the Code to define impartiality not only in its familiar sense -- lack of bias by an individual judge for or against a particular party -- but I also advocate for a definition of impartiality that encompasses its structural dimensions as well.

By structural impartiality I refer to the overall composition of the bench in a jurisdiction. In my work, I have argued that due process entitles litigants to appear not only before an individual judge who is not biased, but also entitles litigants to appear before a judge selected from a structurally impartial bench. I analogize here to the jury. Thirty years ago the Supreme Court held that the due process rights of litigants are violated when a system for selecting jury

[1] For a discussion of the consequences of the Supreme Court's failure to develop meaningful and uniform standards for deciding "appearance" questions *see*, Sherrilyn A. Ifill, *Do Appearances Matter?: Judicial Impartiality and the Supreme Court in Bush v. Gore*, 61 Md.L.Rev. 606 (2002).

venires results in the exclusion of racial minorities or women. *See Taylor v. Louisiana*, 419 U.S. 522 (1975); *Peters v.Kiff*, 407 U.S. 493 (1972). In *Peters v. Kiff*, Justice Thurgood Marshall explained why jury decision-making suffers when racial minorities are excluded:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable.

407 U.S. 493,503. The Court was careful to distinguish the venire from the petit jury. Litigants are not entitled to have members of a particular race or gender on their particular jury. But the pool from which their jurors are selected – the venire – must reflect the diversity of the community. The Court based this not only on the 6th Amendment "fair cross-section" requirement for the selection of juries, but also on the 14th amendment Due Process right of litigants to appear before an impartial tribunal. *See e.g., Morgan v. Illinois*, 504 U.S. 719, 727 (1992); *Taylor*, 419 U.S at 526-28.

I argue that Due Process compels a similar result for the judiciary. As with a petit jury, litigants do not have the right to appear before a judge of a particular race or gender. But the bench itself – the pool from which a litigants particular judge is selected – must include qualified members from a cross-section of the community as well. In other words, structural impartiality is required for the judicial bench, just as it is required for the jury venire. Diversity produces structural impartiality. Judicial selection or election systems which do not produce this structural impartiality or diversity run afoul of the Due Process impartial tribunal mandate. Moreover as Justice Marshall suggests in the context of jury decision-making, judicial decision-making that fails to include racial minorities and women is impoverished by the absence of the kind of diverse perspectives and viewpoints that enhance informed legal decision-making.

As a number of jurisdictions begin to re-think their method of electing judges after *White*, this matter of structural impartiality becomes increasingly important. In most jurisdictions, the effect of judicial selection methods on diversity is not, for the most part, a central part of this conversation. Even where diversity is discussed and considered, it is often not regarded as essential to both the impartiality and the integrity of the bench.

Some jurisdictions are responding to what I view as the heavy-handed brow beating of Justices Scalia, O'Connor and Kennedy, who may go out of their way to express their contempt for judicial elections. I believe that many jurisdictions and analyses have over-read *White*. The Court's decision does not demand that jurisdictions abolish judicial elections. I contend that jurisdictions should resist efforts by the Court to impose on the states the Court's own view of how best to select judges. One need only look at the highly contentious, ideological and nakedly political battles over the appointment of judges to the federal bench or the recent flap over Justice Scalia's duck-hunting trip with the Vice-President, to know that appointing judges is not the panacea for solving problems of judicial impartiality, independence and integrity.

However, I do not argue that all judicial elections systems are perfect. Many, perhaps most, are deeply flawed. I have represented minority voters in jurisdictions throughout this country who have argued that at-large systems for electing judges deny minority voters an equal opportunity to elect judges to the bench. I live in the state of Maryland where many of us waited with baited breath this past March to see if a majority of white voters in Baltimore County would break that jurisdiction's shameful history of voting qualified appointed black Circuit Court judges out of office. Fortunately, Baltimore County voters restored a sense of integrity to their

judicial elections by supporting the qualified African American woman incumbent, Vicki Ballou-Watts, on the Circuit Court.[2]

Instead I argue that the Code should remind jurisdictions, as they grapple with adopting new or revised methods of selecting their judges, that the question of diversity is one that must be considered and addressed --not because it's good to have a bench that "looks like America" -- but because due process suggests that diversity is closely connected to impartiality.

I offer two language amendments to the Commentary Section of Canon 1. I regard these amendments as reflective of the Code's important role in articulating the highest aspirational standards for our nation's courts. In section 4 of the Commentary to Canon 1, the text now defines "a judiciary of integrity" as "one in which judges are known for their probity, fairness, honesty, uprightness and soundness of character." It further defines "an independent judiciary" as "one free of inappropriate outside influences," and explains that "[p]ublic confidence in the impartiality, integrity and independence of the judiciary is maintained by judges acting in a manner free from favoritism, self-interest or bias." I contend that in this commentary the following language should be added:

> ***Impartiality in the context of judges denotes an open mind and the absence of bias in favor of, or against, individual parties or classes of parties. An impartial judiciary is one in which judges are selected by means that are fair and equitable and that result in a qualified and diverse bench.***

In my view, this description of impartiality addresses both the individual and structural components of this important component of due process. I welcome the opportunity to talk with Committee members and others about this proposed language and the matters that I have raised in this testimony today. I can be contacted at sifill@law.umaryland.edu. Thank you.

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[2] Stephanie Hanes, *Judge First African-American to Win Countywide Vote*, BALTIMORE SUN, online version at www.baltimoresun.com/news/loca/bal-md.judicial04mar04,0,464589.story?coll_bal-local-headlines, March 4, 2004.

BIO OF SHERRILYN A. IFILL

Sherrilyn A. Ifill is an Associate Professor of Law at the University of Maryland School of Law in Baltimore, Maryland, where she teaches Civil Procedure, Constitutional Law and an array of civil rights courses. She is a graduate of Vassar College and New York University School of Law. Prior to teaching, she served as an Assistant Counsel at the NAACP Legal Defense and Educational Fund, Inc., where she litigated voting rights cases. In particular, Professor Ifill litigated cases on behalf of black voters challenging the method of electing judicial officers in Texas, Louisiana and Oklahoma. Professor Ifill was counsel for the petitioners in *Houston Lawyers' Ass'n. v. Atty. Gen'l. of Texas*, in which the Supreme Court held that Section 2 of the Voting Rights Act applies to judicial elections.

Professor Ifill's scholarly work has been focused on exploring the intersection between judicial impartiality, judicial selection and diversity on the bench. Her articles, "Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts," and "Racial Diversity on the Bench: Beyond Role Models and Public Confidence," were published in the BOSTON COLLEGE LAW REVIEW and WASHINGTON & LEE LAW REVIEW, respectively. Her article "Do Appearances Matter?: Judicial Impartiality and the Supreme Court in *Bush v. Gore*" was published in the MARYLAND LAW REVIEW in 2002. Her manuscript "The Fight for Judicial Elections after *Republican Party of Minnesota v. White*" will be published in the MICHIGAN JOURNAL OF RACE AND THE LAW in 2005.

Professor Ifill is a regular and highly-regarded commentator on matters related to federal judicial selection and recusal of federal judges. Her op-ed article "A Matter of Balance," about diversity on the Fourth Circuit Court of Appeals, appeared in the BALTIMORE SUN in November, 2003. "Can He Be Recused?" about the controversy surrounding Justice Scalia's recusal decision in *Cheney v. U.S. District Court for the District of Columbia*, was published in the LEGAL TIMES in April 2004.

In addition to her scholarly work in the area of judicial diversity and judicial decision-making, Professor Ifill writes about racial violence and reconciliation efforts. She is currently writing a book about lynching in Maryland entitled, *A Conversation On Race: Truth, Reconciliation and Lynching on Maryland's Eastern Shore*. Her article, "Creating a Truth and Reconciliation Commission for Lynching" was published last summer in the MINNESOTA JOURNAL OF LAW & INEQUALITY.